

Decision 02-05-012

May 2, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking into
Implementation of Public Utilities Code
Section 390.

Rulemaking 99-11-022
(Filed November 18, 1999)

ORDER DENYING REHEARING OF DECISION (D.) 01-10-069

In this decision, we dispose of the application for rehearing of Decision (D.) 01-10-069 filed by the California Cogeneration Council.

I. Background

On June 14, 2001, the Commission issued Decision (D.) 01-06-015. In D.01-06-015, the Commission outlined three non-standard contract modifications that, if made prior to July 15, 2001, would be automatically deemed reasonable.¹ On July 13, 2001, the Independent Energy Producers Association (“IEP”) filed a petition (“Petition”) to modify the July 15, 2001 safe harbor date established in D.01-06-015 to July 31, 2001. Because IEP’s Petition was not filed in time for the full Commission to act before July 15, the Assigned Administrative Law Judge (“ALJ”) issued a ruling extending the July 15, 2001 date set in D.01-06-015 “until the commission can act on IEP’s Petition.”² (Administrative Law Judge’s Ruling Shortening Time for Comment (“July 19 Ruling”), July 19, 2001, at p. 3.)

¹ This deemed reasonable date has been referred to by various parties in this proceeding as a “safe harbor” date.

² The first opportunity that the Commission would have had to consider IEP’s Petition was at its August 2nd meeting. This would have been after the July 31 date requested by IEP. Therefore, had the ALJ not acted, and the Commission subsequently granted IEP’s Petition, parties would have unnecessarily submitted contract modifications made between July 15 and July 31 to the Commission for approval.

The Commission did not act on IEP's Petition until September 6, 2001. On September 4, 2001, the California Cogeneration Council ("CCC") requested that the safe harbor date be extended through September 6, 2001, the date the Commission was scheduled to consider IEP's Petition. (Motion of the California Cogeneration Council for Leave to File Supplemental Comments on IEP Petition for Modification of D.01-06-015, filed Sept. 4, 2001, at pp. 2-3.) On the same day, Southern California Edison Company ("Edison") filed a response in support of CCC's motion and supplemental comments, but requested that the safe harbor date be extended through September 13, 2001. (Response of Southern California Edison Company to Motion by California Cogeneration Council for Leave to File Supplemental Comments on IEP Petition for Modification of Decision 01-06-015, filed Sept. 4, 2001, at p. 2.) On September 6, 2001, the Commission granted IEP's Petition in D.01-09-021 and extended the safe harbor date to July 31, 2001. On September 14, 2001, Edison filed a petition to modify the safe harbor date established in D.01-09-021 from July 31, 2001 to September 6, 2001.

On October 25, 2001, the Commission denied Edison's Petition in D.01-10-069. On November 29, 2001, CCC filed a timely application for rehearing of D.01-10-069. CCC contends that by setting the safe harbor date to July 31, 2001, rather than September 6, 2001, the date the Commission voted on IEP's Petition, the Commission retroactively impaired parties' vested rights and contractual obligations. CCC also asserts that because it detrimentally relied on the July 19 Ruling, the Commission is estopped from setting a safe harbor deadline prior to September 6, 2001.

II. Discussion

CCC's rehearing application is premised on its mistaken belief that the July 19 Ruling is a Commission order and prevents the Commission from establishing a safe harbor date prior to the date the Commission acted on IEP's

Petition. ALJs have authority to issue rulings on procedural matters and these ruling are binding on parties. (Commission Rules of Practice and Procedure, Rule 63.) However, absent ratification from the Commission, these rulings are not Commission decisions and do not restrict the Commission's decisionmaking authority.³ Only the Commission may grant or deny IEP's Petition to extend the safe harbor date. If CCC's assertion were correct, then the Commission would not have had the discretion to deny IEP's Petition. Such a conclusion is contrary to the Commission's authority and would give ALJs greater authority than provided under the Commission's Rules of Practice and Procedure. Consequently, the July 19 Ruling does not restrict the Commission's ability to act on IEP's Petition.

CCC first maintains that the Commission impaired existing contracts by "retroactively" setting the safe harbor date to July 31, 2001. (CCC App., at pp. 3-4.) This assertion is without merit. Until D.01-09-021 was issued, the safe harbor deadline was July 15, 2001. In fact, in D.01-07-031⁴, which clarified D.01-06-015, we declined to extend this date to July 31, 2001, stating:

D.01-06-015 does not preclude amendments being executed after July 15, 2001. QFs and utilities may continue to negotiate and execute contract amendments at any time. However, the blanket pre-approval of the specific contract amendments discussed in D.01-06-015 is limited to amendments executed no later than July 15. So, the utility may be at risk in subsequent reasonableness reviews for execution of amendments made after July 15. *We are not persuaded that an extension of the deadline is required at this time.* (D.01-07-031, at p. 3 (emphasis added).)

Therefore, parties were fully aware that the safe harbor date was July 15, 2001 and that we did not believe any extension beyond this date was necessary. As

³ Pursuant to Public Utilities Code section 310, "[e]very finding, opinion, and order made by the commissioner or the commissioners so designated pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission."

⁴ D.01-07-031 was issued on July 12, 2001, the day before IEP filed its Petition.

discussed above, the July 19 Ruling does not reflect a change in this conclusion. Indeed, based on the above language, parties would be hard-pressed to conclude that we would even grant IEP's Petition, let alone permit an open-ended extension of the safe harbor date.

CCC appears to believe that it was "reasonable" for parties to expect that the safe harbor date had been extended indefinitely, and that parties could include such a condition in their contract amendments. (CCC App., at p. 4.) However, even under a generous interpretation of the July 19 Ruling, there was no basis for the parties to reasonably conclude that we would set a date *beyond* the July 31 date requested by IEP.⁵ Additionally, notwithstanding this ruling, we still retained the discretion to grant or deny IEP's Petition. Consequently, it does not appear reasonable for parties to enter into a contract premised on the assumption that we would both grant IEP's Petition *and* extend the safe harbor date to some time after what had been requested.⁶ Consequently, CCC's arguments regarding contract impairment are without merit.

CCC next argues that the Commission is estopped from extending the safe harbor date to July 31 because parties detrimentally relied on the July 19 Ruling. (CCC App., at p. 5.) These arguments are without avail. First, even if the July 19 Ruling extended the safe harbor date and parties had acted in reliance of this ruling, there is nothing in the record to support a conclusion that this date

⁵ In D.01-10-069, we note that no party had requested an extension of the safe harbor date beyond July 31 until CCC filed its request to extend the safe harbor date to September 6. (D.01-10-069, at p. 10.) We then explained why we concluded that an extension of the safe harbor date beyond July 31 was not warranted. (D.01-10-069, at pp. 10-12.)

⁶ Furthermore, our actions do not prevent parties from amending their contracts, but merely restricts the time period for which the contract amendments specified in D.01-06-015 would be automatically deemed reasonable. (D.01-10-069, at p. 11.) As parties are well aware, we decided to pre-approve the the contract amendments identified in D.01-06-015 based on market conditions *at that time*. (See, D.01-06-015, at p. 3; D.01-07-031, at p. 1.) However, due to changing market conditions we limited the period during which such amendments would be automatically deemed reasonable. (D.01-10-069, at pp. 11-12.) Consequently, contract amendments similar to those specified in D.01-06-015 which were entered into after the safe harbor date would be subject to Commission review and parties would be required to justify why those amendments were reasonable. (See, e.g., D.01-07-031, at p. 3; D.01-10-069, at p. 12.) The fact that parties wanted their amendments, which were entered into after the July 31, 2001 safe harbor date, to be automatically approved, should not restrict our ability to exercise our discretion in this matter.

would be extended beyond the July 31 date identified in IEP's Petition. The July 19 Ruling specifically extends the safe harbor date to permit the Commission to act on that request. Therefore, at best, the July 19 Ruling may have prevented us from setting a safe harbor date prior to July 31, 2001. Second, at the time we issued the July 19 Ruling, the safe harbor date was July 15. Therefore, even if the parties had relied on this ruling, they would not have been injured by it, since the Commission extended the safe harbor date to July 31 as requested in IEP's Petition. Finally, parties' actions between August 1, 2001 and September 6, 2001 were premised on their own conclusion that we would both grant IEP's Petition and extend the safe harbor date beyond July 31. However, nothing in the July 19 Ruling nor any other orders cited by CCC support such a conclusion. Accordingly, there is no basis for finding estoppel and CCC's assertions are without merit.

Therefore **IT IS ORDERED** that rehearing of D.01-10-069 is denied.

This order is effective today.

Dated May 2, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

I dissent.

/s/ HENRY M. DUQUE
Commissioner